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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO VERDIN,

Defendant and Appellant.

G054703

(Super. Ct. No. 12CF1491)

O P I N I O N

Appeal from an order and judgment of the Superior Court of Orange County, W. Michael Hayes, Judge, and Robert R. Fitzgerald, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to Cal. Const., art. VI, § 6.)  
Reversed and remanded.

Rex Adam Williams, under appointment by the Court of Appeal, for  
Defendant and Respondent.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland,  
Scott C. Taylor and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Armando Verdin pleaded no contest to possession of cocaine base while armed with a loaded firearm (Health & Saf. Code, § 11370.1) and possession of cocaine base for sale (Health & Saf. Code, § 11351.5). Verdin and codefendant Vanessa Cerda filed a suppression motion claiming the officers relied on illegally obtained information to support issuance of a search warrant and asked the trial court to traverse and quash the warrant. The court denied the motion to traverse and quash the warrant, but declined to rule on whether Verdin had been illegally detained and arrested. We issued an alternative writ directing the trial court to hold an evidentiary hearing on Verdin and Cerda's suppression motion.

The trial court held a hearing in response to the alternative writ. The court accepted the prosecutor's concession Verdin had been detained illegally, suppressed "the evidence derived from that detention," and denied Verdin and Cerda an evidentiary hearing. Verdin contends the court erred in denying a hearing and therefore he was unable to show the evidence supporting the warrantless entry into an apartment was the product of Verdin's illegal detention and arrest. We agree the court erred in not holding an evidentiary hearing to determine what evidence should be suppressed. We therefore reverse the judgment and remand for further proceedings.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

In February 2013, the Orange County District Attorney filed an information alleging Verdin and codefendant Vanessa Cerda on January 25, 2011, possessed for sale cocaine base and marijuana (Health & Saf. Code, § 11351.5 & 11359), possessed of an assault weapon (§12280, subd. (b)), and committed child endangerment (Pen. Code, § 273a, subd.(a)).

Verdin filed an initial suppression motion and several months later expanded his motion to include a motion to quash and traverse the search warrant for his residence. Verdin asserted the facts at the suppression hearing would show that on

January 25, 2011, Santa Ana gang Detective Capacete saw him leave an apartment at 805 Townsend Street. Capacete recognized Verdin as a Townsend gang member, and alerted other detectives. When Verdin spotted the detectives he changed direction, ignoring orders to stop. Detectives apprehended him in an alley about 75 yards from the Townsend apartments and arrested him for trespassing and obstructing an officer. Verdin was handcuffed and placed in the back of a police car. The detectives seized Verdin's cell phone, searched its contents, and found numerous photographs, including a photo of codefendant Cerda.

Cerda was standing nearby and apparently saw the detectives arrest Verdin. As she walked through the courtyard carrying an infant, Capacete approached her and asked how she knew Verdin. Cerda denied knowing Verdin, entered her car, and attempted to leave, but another detective ordered Cerda to stop because he believed she had parked illegally in the alley and he wanted to conduct a narcotics investigation. When the detective showed Cerda photos of her that he found in Verdin's cell phone, she admitted he was her boyfriend and the father of the infant she had placed in her car.

The detectives and Cerda moved from the alley to the porch area outside apartment 5 in the Townsend apartments. Cerda claimed Verdin stayed with her in apartment 5, but did not reside there. When asked if anyone was in the apartment, Cerda replied her son was inside alone. Detectives looked inside the apartment and saw the child and a coffee table covered with papers and a plastic baggie containing an off-white wafer substance detectives suspected was cocaine base. The detectives entered the apartment to prevent the child from ingesting the suspected cocaine, and to determine whether anyone else was inside.

The detectives obtained a search warrant based on their observations during the warrantless search of apartment 5. While executing the warrant, officers found an extension cord running to apartment 3. They entered that apartment, and found photos of Verdin and a rental agreement reflecting the residents of apartment 5 were moving to

apartment 3. Based on these observations, officers obtained a second warrant for apartment 3.

Verdin in his motions asserted his detention and arrest were illegal, and the search of his cell phone exceeded the lawful scope of a search incident to an arrest for trespass and obstruction of an officer. Verdin also argued there were no exigent circumstances justifying entry into the apartment, the officers' accounts were false, and the community caretaking doctrine did not apply because the evidence would show the officers entered the apartment to search its interior for evidence. Verdin contended the evidence would show the information officers obtained from Verdin's illegal detention and arrest tainted the entire investigation and led to the warrantless observations and search of apartment 5. Excising the officers' ensuing illegally obtained observations would reveal that no probable cause supported the search warrants.

Codefendant Cerda also filed a motion to traverse and quash the search warrants and suppress evidence. Verdin joined in Cerda's motion. Cerda's motion alleged she was not illegally parked and therefore had been illegally detained, and officers had no basis to suspect a narcotics violation when they detained her, which she asserted was unduly prolonged. She alleged the evidence at the hearing would contradict the officers' claim they could see a three-year-old child in her apartment near a white substance that appeared to be cocaine. According to Cerda's motion, the blinds on the front of her apartment were drawn, no one from outside could see the inside of the apartment, and there was no cocaine on a table in the front room. She argued no exigent circumstances justified the entry into her apartment because her child was with a babysitter and not in the apartment.

Cerda moved to quash the warrants because the officers incorporated information obtained from her illegal detention, and without that information the warrant lacked probable cause. Cerda also argued the search warrants were based on the prior illegal entry and search. She asked the court to traverse the initial warrant affidavit for

false statements and omissions. Finally, Cerda asked for suppression of all evidence obtained from her detention and the searches, including the specific items listed in her motion. Cerda's motion informed the trial court she intended to present evidence at the hearing to support her claims.

On June 6, 2014, Judge Hayes held a hearing on the motions. The court found the declarations supporting the traversal motion were defective and therefore Verdin and Cerda failed to make a preliminary showing of intentional falsehood or reckless disregard of the truth in the affidavits to merit a *Franks* hearing. (*Franks v. Delaware* (1978) 438 U.S. 154.)

After denying the traversal motion, Judge Hayes noted what remained was a "standard" suppression motion and the prosecutor had the burden to justify the warrantless search. The prosecutor stipulated he would not use Verdin's cell phone photos obtained when officers seized the phone after detaining and then arresting Verdin, but did not concede Verdin's detention was unlawful. The court accepted the stipulation and questioned whether an evidentiary hearing was necessary, informing Verdin's attorney "[y]ou don't automatically get a hearing with testimony just because you want it. . . ." Verdin's counsel argued he was entitled to a hearing because the illegal search of Verdin's phone required more than "merely suppression of those photos," and noted the presence of factual disputes, such as whether the officer could see cocaine through the apartment window.

The court announced it would not hold a hearing "on whether or not the detention itself was lawful." When asked for clarification, the court explained, "I'm simply accepting the People's stipulation to suppress the photographs, and I'm making no ruling on anybody's detention," and "I'm simply saying for the record I didn't conduct a hearing." Finally, the court declared there was probable cause to issue the search warrant without considering the evidence of Verdin's cell phone photos and therefore it did not matter whether the search of the phone was legal. (*People v. Weiss* (1999) 20 Cal.4th

1073, 1077 [search warrant upheld if probable cause to search remains after excising unlawfully obtained information from warrant and officers would have sought the warrant regardless of the illegally obtained information].)

In October 2014, Verdin and Cerda renewed their request for an evidentiary hearing on their motion to suppress, traverse and quash the search warrants. Verdin argued the officer's observation of cocaine through the apartment window was the product of his unlawful detention and asked the court to rule on whether his detention was lawful. The prosecutor argued that Verdin was not entitled to a hearing because the court previously denied the motion and there was no right under Penal Code section 1538.5 to relitigate prior rulings. Judge Hayes denied the motion without granting an evidentiary hearing.

In response to Verdin and Cerda's petition for a writ of mandate or prohibition, we issued an alternative writ directing the trial court to hold an evidentiary hearing on Verdin's and Cerda's suppression motion to show cause why a peremptory writ should not issue.

In January 2015, Judge Hayes held a hearing in response to the alternative writ. At the outset, the prosecutor conceded Verdin's detention was illegal and the court should suppress the "evidence that derives from that unlawful detention." **~(RT 139)~** The prosecutor did not concede the initial search of the apartment and the search warrants were illegal, however.

Verdin's counsel sought clarification on the scope of the prosecutor's concession that the fruits of the illegal detention should be suppressed. He urged the court to hold an evidentiary hearing so it could determine whether to suppress all the evidence Verdin listed in his suppression motion. Verdin explained the court should hear evidence about the configuration of the apartment, whether the officers' observations were made "in the curtilage of the home," and whether their observations were the result of Verdin's illegal detention. Verdin's counsel also explained an evidentiary hearing was

necessary because “I’m going to need to show the court he [the officer] was being untruthful about his presence at that location and about what he observed.”

After an extended discussion, the trial court concluded there was no need for an evidentiary hearing because the prosecutor conceded Verdin was detained illegally. Verdin’s attorney asked the court either to suppress the evidence listed in his suppression motion or hold an evidentiary hearing, but the court responded, “I’m going to let the Court of Appeal sort all that out.” At the end of the hearing, the court similarly announced, “I have decided not to hold a further hearing; that at this hearing, the People conceded that the detention in the alley was illegal and that the evidence derived from that detention was unlawfully obtained. And the Court of Appeal can do with it what they wish.”

The trial court later granted the prosecution’s motion to sever Verdin’s case from Cerda’s.<sup>1</sup> Verdin eventually pleaded no contest to possession of a controlled substance with a firearm and possession of cocaine base for sale and was placed on probation.

## II

### DISCUSSION

#### *A. The Trial Court Erred in Denying an Evidentiary Hearing on Verdin’s Suppression Motion*

Verdin contends the trial court erred when it denied him a hearing on his suppression motion. Verdin asserts the prosecution had the burden to show the officer made his warrantless observations through apartment 5’s window from a lawful vantage

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<sup>1</sup> A different judge hearing Cerda’s case interpreted Judge Hayes’s ruling as suppressing all the evidence listed in the suppression motion and dismissed the case when the prosecution could not proceed. In an unpublished decision, we reversed the court’s order dismissing the action. We explained Judge Hayes’s order did not suppress all the prosecutor’s evidence, but we also concluded the court denied Cerda her right to fully litigate her suppression motion and directed the trial court to grant her the opportunity to fully litigate the matter. (*People v. Cerda* (Sept. 17, 2018, G054085) [nonpub opn.] )

point. (*People v. Camacho* (2000) 23 Cal.4th 824, 832-833 [illegal warrantless search occurred when officers looked through a window of a residence from an area where neither the public nor the police had been invited].) He also argues the officer's observations through the apartment window and subsequent warrantless entry into the apartment were the product of Verdin's illegal detention. Because the prosecution failed to meet its burden justifying these warrantless intrusions, Verdin reasons we must reverse the judgment and direct the court to grant his suppression motion. Alternatively, he contends the court erred in denying his request for an evidentiary hearing.

A search warrant based on information acquired by an earlier illegal search is itself illegal. (*People v. Chapman* (1984) 36 Cal.3d 98, 113, disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 861.) No Fourth Amendment violation occurs, however, if the earlier warrantless search was lawful or police obtained the information in the search warrant independent of any illegality. (*Segura v. U.S.* (1984) 468 U.S. 796, 798 [no basis to invalidate a search warrant issued on information unrelated to earlier illegal entry].) Because the trial court declined to conduct an evidentiary hearing, we are in no position to resolve Verdin's Fourth Amendment contentions.

The trial court erred when it failed to hold a hearing to determine whether the officer's observations from peering into the apartment were lawful or whether those observations, and the subsequent warrantless entry into the apartment, were the product of Verdin's illegal detention. "[W]hether the taint flowing from the illegal police conduct had been adequately purged or dissipated is a factual matter . . . to be determined by the trier of fact." (*Lozoya v. Superior Court* (1987) 189 Cal.App.3d 1332, 1342.)

In *People v. Sesslin* (1968) 68 Cal.2d 418, the defendant was convicted of forgery based on handwriting exemplars obtained after he had been arrested illegally. The Attorney General argued the defendant consented to provide a handwriting exemplar and therefore the evidence was not obtained by exploitation of the illegal arrest. Our

Supreme Court rejected the argument because the trial court “made no finding that the prosecution sustained its burden of showing that defendant freely gave the exemplars.” (*Id.* at p. 428.) Similarly, the trial court here heard no evidence and never resolved whether the officer’s observations through the apartment window were the product of Verdin’s earlier detention or whether exigent circumstances supported the warrantless entry into the apartment. These issues presented factual disputes unrelated to the officers’ observations and entry into the apartment, but in absence of an evidentiary hearing and findings, we are in no position to reach this conclusion.

The Attorney General contends the trial court had no obligation to hold an evidentiary hearing and allow Verdin to show the officer’s observations through the apartment window were directly linked to his illegal detention because Verdin’s counsel conceded that the officer made his observation from a “lawful vantage point.” In support, the Attorney General cites us to one page from the January 2015 hearing that spanned just over 40 pages and involved an extended and often confusing discussion between counsel and the court over the scope of the suppression motion. The trial judge asked numerous questions designed to define specifically the issues stemming from the officer’s observations into the apartment. After reviewing the record, we conclude the passage relied on by the Attorney General is insufficient to establish that Verdin’s counsel made any concession.

The trial court asked Verdin’s counsel, “Is it really did he have a right to look through an open window from a public place, or is it he wouldn’t have been there except for what he found in the illegal detention?” Verdin’s counsel responded, “Yeah, the latter question is the question I would like the court to answer. And I don’t think the court can answer that question in the context of the 1538.5 without hearing evidence and testimony.” In essence, Verdin’s counsel argued the officer’s observations of the apartment’s interior were the direct result of Verdin’s illegal detention.

The following colloquy then took place:

“THE COURT: And that is why I asked the question before when you used the word ‘porch.’ To me, a porch is a location in front of generally somebody’s house on private property.

“In apartments – and believe me, I’ve read this and read this and read this. I get a picture from your pleadings about what occurred. And there’s the sidewalk in front of the apartments, and it’s a two-story apartment. And somehow they end up on the public walkway in front of apartments 3 and 5, with an extension cord running between the two, and they look in the window and see something. And that’s why I said, ‘It’s not really a porch. It’s a public walkway.’

“I’m hearing you say I – I’m not going to dispute that it’s a public walkway where the public goes to get to apartments, but whether or not they ever would have been there.

“Is that what you’re saying?

“MR. BERCHER: That’s most of what I’m saying, yes.

“THE COURT: Well, then the devil is in the details. What’s the part you’re –

“MR. BERCHER: “I agree, which is why we need to have the hearing. In other words, I’m not prepared to – to make an offer of proof that I want the court to accept.”

We do not view counsel’s qualified response as a concession the officer made his observations from a “lawful vantage point.” Moments before this exchange Verdin’s counsel urged the court “to hear evidence about the configuration of the apartment, about whether this really was a plain-view point of observation, or whether it was in the curtilage of the home. And all of those factors relate to the credibility of the officers making those observations.”

Counsel throughout the hearing made clear he wanted an evidentiary hearing to demonstrate the officer “was being untruthful about his presence at that

location and about what he observed.” Earlier in the hearing counsel objected that the court was making “assumptions” about the vantage point without seeing photographs or hearing evidence on the issues. Counsel explained he could not make an offer of proof without an opportunity to explore the issue in an evidentiary hearing. It is clear counsel did not concede the officer made his observations from a legal vantage point; indeed, he argued otherwise in renewing his suppression motion in December 2016. And no matter where the officer stood when he looked through the apartment window, Verdin consistently asserted the officer could not see what he claimed to have seen. Verdin was entitled to an evidentiary hearing to explore these issues.

### III

#### DISPOSITION

The judgment is reversed and remanded for further proceedings consistent with this opinion.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.